90-146

No. _____

JUL 2 1990
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1990

WILLIAM MARION WALKER,

Petitioner,

v.

BOARD OF COUNTY COMMISSIONERS OF MUSKOGEE COUNTY, OKLAHOMA, AND MUSKOGEE COUNTY COURT CLERK, NADINE HARNAGE,

Respondents.

Petition For Writ Of Certiorari To The Supreme Court of Oklahoma

PETITION FOR WRIT OF CERTIORARI

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QUESTION FOR REVIEW

DOES THE ALLEGATION THAT THE PROXIMATE CAUSE OF INJURY WAS A CUSTOM AND POLICY OF THE DEFENDANT GOVERNMENTAL ENTITY WITHOUT DUE PROCESS STATE A CAUSE OF ACTION PURSUANT TO 42 USC § 1983?

Case Background

This case arises from a civil rights action in state court which resulted in the May 5, 1987, judgment in case number C-84-1518 from Muskogee County, Oklahoma. Upon appeal the Court of Appeals rendered an opinion dated May 17, 1988, in case number 68,800. The Supreme Court of Oklahoma granted certiorari and rendered an opinion February 27, 1990, in case number, 68,800, *Walker v. Bd. of County Comm.*, 788 P.2d 957 (Okl. 1990). On April 3, 1990, rehearing was denied. This court has jurisdiction pursuant to 28 U.S.C. § 1257.

The case involves 42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

The case arose from a foreclosure action on the homestead of William Marion Walker (Walker) wherein proceeds of the sale were paid into the fund of the court. The trial court issued an opinion on the priorities of other party claimants in the suit. The court clerk, pursuant to procedure practiced in the office for many years, immediately paid out the proceeds. The final order of the court changed the priorities, as set out in the interlocutory

order, and granted all proceeds in excess of the mortgage amount to Walker. The court clerk had no proceeds to pay to Walker due to the premature payment based upon the interlocutory order.

Since the Supreme Court of Oklahoma ruled that Walker failed to state a cause of action, the relevant facts all arise from the pleadings. The Amended Petition stated the following:

> The plaintiff, for cause of action against the above named defendants, alleges as follows:
>
> The plaintiff is a citizen of the United States and a resident of Muskogee County, Oklahoma. That defendant county is created by and operates under color of the law of the State of Oklahoma. That defendant court clerk was acting in her official capacity at all times relevant to the cause.
>
> I. FIRST CAUSE OF ACTION
>
> That on or about the 10th day of February, 1983, plaintiff was defendant in Civil #82-123 in the District Court of Muskogee County, State of Oklahoma and a hearing was held in which the proceeds of a foreclosure sale of the homestead of the defendant were distributed among litigants in said cause. Said hearing was had without notice to defendant in that case (and plaintiff herein, William Marion Walker) by the court clerk's office of Muskogee County. Due to the order arising out of said hearing, proceeds of the sale of the homestead in excess of all mortgages were distributed to other claimants in the approximate amount of $10,000.00 by the Court Clerk under the custom and policy of the county to distribute judgment funds prior to the time the judgment becomes final. Although this

> plaintiff has been diligent in efforts to recover said funds from the office of the court clerk, he has still been totally deprived of the property consisting of these funds without due process of law.

II. SECOND CAUSE OF ACTION

> All of the above allegations are hereby incorporated by reference and plaintiff alleges that the actions alleged by the defendants were negligent and constitute liability to plaintiff for the funds lost through defendants' acts.

The pleadings were later subsidized by a filing in the record of the following stipulation of the parties:

> It has been the custom and the policy of the office of the court clerk for many years to pay a money judgment when the relevant funds were deposited in the court and the litigant or their attorneys, pursuant to the order or judgment of the court, made the demand therefor.

The Supreme Court of Oklahoma held that the cause sounded in "simple negligence" and a § 1983 cause was not stated. Since the case was filed pursuant to § 1983, the federal question for review was set out in the Amended Petition and has been argued at every stage of the proceedings.

ARGUMENT

The Supreme Court of Oklahoma affirmed the trial court on the grounds that the trial court petition alleged "mere negligence." The above quoted Amended Petition alleged that the injury arose from the "custom and policy

of the county to distribute judgment funds prior to the time the judgment becomes final." The Oklahoma court conclusion is exactly opposite to the language of this Court distinguishing an injury that arises from an established state procedure. *Hudson v. Palmer,* 468 U.S. 517, 533 (1984).

> Two terms ago, we reaffirmed our holding in *Parratt* in *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982), in the course of holding that postdeprivation remedies do not satisfy due process where a deprivation of property is caused by conduct pursuant to established state procedure, rather than random and unauthorized action.

Nor can it be said that the cause was just artfully plead with no specific facts to support the cause. The above quoted stipulated fact, that is filed of record in the case, states that the injury arose due to the "custom and policy of the court clerk" which had been practice and procedure "for many years."

The statutes contain no procedures directing the timing of payment of judgment by the court clerk. There is no policy on the subject that arises from the county commissioners. The court clerk is therefor the one whose "edicts or acts may fairly be said to represent official policy." *Monell v. New York City Dept. of Social Services,* 436 U.S. 658, 694 (1978). The choice of the court clerk to prematurely pay the funds rather than the alternative of waiting for the judgment to become final raises the cause even if the procedure had not been a custom and policy practiced for many years. *Pembaur v. Cincinnati,* 475 U.S. 469 (1986).

When the parties stipulated that the court clerk policy had existed for many years, it foreclosed the alternative cause of action quoted above which did sound in common law negligence. The intentional following of an established procedure cannot result in "simple negligence" as found in the Oklahoma court decision. The issue of neglect is closed by the intentional act of following an established procedure. The act was chargeable to the governmental defendant pursuant to *Monell* and *Pembaur, supra.*

The only grounds that this Court has recognized to establish a cause against a government defendant are either a "custom and policy" of that entity or the "edicts or acts" of an official that fairly represents official policy. Both elements are found in the petition and the stipulated fact in this case.

The Oklahoma court decision stands in stark contrast to all the decisions on the subject by this Court. The decision expressly states that the allegation of Walker was that the proximate cause of the injury was the "custom" of premature payment by the court clerk. If the allegations of the case state only a cause in simple negligence, then the only allegations that this court has previously recognized to state a § 1983 cause against a governmental entity have been foreclosed.

Respectfully submitted,

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IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

WILLIAM MARION WALKER, Appellant,	)	FOR OFFICIAL PUBLICATION
v.	)	No. 68,800
BOARD OF COUNTY COMMISSIONERS OF MUSKOGEE COUNTY, OKLAHOMA, AND MUSKOGEE COUNTY COURT CLERK, NADINE HARNAGE, Appellees.	)	(Filed FEB 27 1990)

CERTIORARI PREVIOUSLY GRANTED. COURT OF APPEALS OPINION VACATED. ORDER OF THE DISTRICT COURT DISMISSING THE ACTION IS AFFIRMED

SIMMS, J:

Appellant, plaintiff below, commenced a civil rights action brought under 41 U.S.C. § 1983, against the court clerk and the county commissioners of Muskogee County. The petition alleged that the court clerk was "negligent" for paying out the proceeds from a foreclosure sale to parties unentitled thereto and refusing to pay the proceeds to the rightful recipient.

The Court of Appeals held that because the Board of County Commissioners for Muskogee County, had "official policymakers for the county," had not instituted a policy or custom for the court clerk to follow in paying judgments, there was no policy nor custom which was followed by the court clerk which resulted in a constitutional deprivation of petitioner's rights. The Court of

Appeals, therefore, affirmed the trial court's order dismissing the action. Plaintiff then sought certiorari in this Court. We have previously granted certiorari, and now vacate the opinion of the Court of Appeals and affirm the trial court.

I.

The facts leading up to the instant case are that the mortgagee on plaintiff's homestead property brought a foreclosure action against the property, naming plaintiff as a party defendant. Two other creditors intervened in the action alleging debts which were liens upon the homestead. The trial judge approved the subsequent sale of the homestead and set a hearing for the determination of the priority of claims. Due to lack of notice, no one appeared for the hearing, and the trial judge reset the hearing.

In the interim, the creditors presented another district judge with an order entitled "Judgment and Order Determining Priorities and Directing Distribution" which had been approved by all parties except plaintiff who was unaware of this order or of the hearing before the second judge. The order erroneously states that the cause came on for hearing on the date originally set. The order further distributed the proceeds of the sale to creditors who did not have liens on the homestead. The district judge approved the distribution as set out in the order and directed the money from the sale which had been paid to the county court clerk to be distributed to the mortgagee of the homestead and to two judgment lien creditors. After this order was rendered, the creditors made

demand upon the court clerk who immediately paid the money over to the creditors in accordance with the order of distribution.

Plaintiff subsequently learned of the hearing and judgment and moved for reconsideration on the grounds that he was denied due process. The district judge who rendered the ex parte judgment agreed that petitioner had been deprived of his constitutional rights to due process, and therefore, granted a rehearing. Upon rehearing, the court ruled that plaintiff was entitled to monies in excess after the mortgagee's claim was satisfied.

Plaintiff then presented the new order of distribution to the court clerk who refused to pay because the funds had previously been dispersed to the judgment lien creditors under the ex parte order.

Unable to obtain the funds from the court clerk, and unable to sue one of the creditors which had filed for bankruptcy and was protected from actions by bankruptcy law, the petitioner filed this civil rights action under the provisions of 42 U.S.C. § 1983, alleging his constitutional rights were violated by the court clerk when she distributed the excess funds from the foreclosure sale to persons unentitled thereto pursuant to a custom of paying the funds upon demand by the litigants or their attorneys. The trial court petition alleges the actions of the court clerk and the Board of County Commissioners constituted acts of simple "negligence".

II.

In *Wilhelm v. Gray*, Okl., 766 P.2d 1357 (1988), we held that "because the appellants amended petition sounds

only in negligence," there could be no § 1983 relief. In *Wilhelm*, we quoted from *Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 662, for the proposition that allegations of negligence do not rise to the level sufficient to state a claim under § 1983. In *Daniels*, the Supreme Court held that Section 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law. "Where a government official's act causing injury to life, liberty or property is merely negligent, no procedure for compensation is constitutionally required."

The allegations of plaintiffs trial court petition alleging mere negligence fall far short of stating a claim against either the appellee court clerk or the Board of County Commissioners of Muskogee County.

Because plaintiff/appellant has failed to state a claim upon which relief can be granted, the order of the trial court dismissing appellant's petition is AFFIRMED. It is, therefore, unnecessary to address the other issues raised in the appeal.

COURT OF APPEALS OPINION VACATED. JUDGMENT OF THE TRIAL COURT AFFIRMED.

HARGRAVE, C.J., OPALA, V.C.J., HODGES, SIMMS, DOOLIN, JJ., CONCUR. LAVENDER, WILSON, KAUGER, JJ., CONCUR IN RESULT.

SUMMERS, J., DISQUALIFIED.

NOT FOR PUBLICATION

THE COURT OF APPEALS OF THE STATE
OF OKLAHOMA
OKLAHOMA CITY DIVISIONS

WILLIAM MARION WALKER, Appellant, versus BOARD OF COUNTY COMMISSIONERS OF MUSKOGEE COUNTY, OKLAHOMA, and MUSKOGEE COUNTY COURT CLERK, NADINE HARNAGE, Appellees.	)	Case Number 68,800

SUMMARY OPINION
(Filed May 17, 1988)

Opinion by LESTER A. REYNOLDS, Judge:

Appellant Walker was named as a defendant in a foreclosure action upon his homestead. Two creditors intervened alleging debts which were not liens upon the homestead. The homestead was sold and an Order Confirming Sale was approved by the trial judge.

A hearing for determination of priority of claims was set for February 10, 1983, but no notices were issued and no one appeared. The trial judge reset the hearing for March 14, 1983.

Another district judge who did not preside over trial of the foreclosure action simultaneously issued a Judgment and Order Determining Priorities and Directing Distribution. The judge was presented with an order which erroneously stated that the cause came on for

hearing on February 10, 1983, and ordered that the proceeds of the sale of the homestead in excess of all mortgages be distributed to creditors Headlee Oil Co., Inc., in the amount of $7,619.74 and Jerry Kellogg, in the amount of $2,047.46, respectively.

The judgment was approved by all parties except Walker, who was given no notice of the hearing or the ex parte judgment. The judgment was filed with the court clerk on February 17, 1983, and did not become known to Appellant until he subsequently received it in the mail.

The court clerk immediately distributed the proceeds to the two judgment creditors in the amounts specified in the judgment.

Upon learning of the judgment, Walker immediately moved for reconsideration on the ground that he had been denied due process. The judge who rendered the ex parte judgment agreed and granted a new hearing.

After a second hearing on determination of priority of the claims, the judge ordered the excess proceeds to be paid instead to Walker.

Upon receipt of the second order, the court clerk was unable to distribute the funds to Walker because the funds had already been distributed to the two creditors under the previous ex parte order.

It is upon these facts that Walker initiated the present action against the county and court clerk for repayment of the funds. Walker contended that the distribution of the proceeds by ex parte order before it was final and without affording him notice and hearing, deprived him

of property under the color of state law without due process.

Walker later stipulated that the court clerk was absolutely immune to personal liability for this ministerial act. The trial court granted the county's motion to dismiss, from which Walker now appeals to this Court.

The primary question for our determination on appeal is whether the absolute immunity extended to a court clerk while performing a ministerial act on behalf of a district judge as conceded by Walker also extended to the county under these facts.

There is no doubt that an erroneous decision of a court is as binding as a correct decision until it is set aside or corrected in a manner provided by law. *Mayhue v. Mayhue*, 706 P.2d 890 (Okla. 1985).

However, a judgment is not final in the sense that it is conclusive upon the parties until the losing party has failed within the time allowed by law to perfect an appeal, or if he has perfected an appeal, until the highest court whose decision is invoked by either party upholds the trial court's decision. *State ex rel Derryberry v. Kerr-McGee Corp.*, 516 P.2d 813 (Okla. 1973); *Powell v. Chastain*, 359 P.2d 336 (Okla. 1961).

In this case, the court clerk's act in paying out the proceeds immediately after judgment was rendered was premature. A district court clerk should not act on a judgment until the time for filing a motion for new trial or petition in error has expired.

The Board of County Commissioners in this case averred that there was no "policy either written or

implied whereby the Board of County Commissioners directs the court clerk to give notice or pay judgments" and that the payment of judgments was "not subject to approval" by the Board.

Walker suggests that liability attached to the county based upon a showing that a custom or policy practiced by the court clerk led to an unconstitutional deprivation.

We find no evidence in the record to establish that the Board of County Commissioners as official policy makers for the county had instituted a custom or policy in the court clerk's office to pay judgments before final. Thus, the trial court correctly refused to impose liability upon the county for the ministerial acts of the court clerk while acting on behalf of a district judge. *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 105 S. Ct. 2427, 85 L. Ed. 2d 791 (1985).

The trial court's judgment is hereby AFFIRMED.

HUNTER, P.J. and HANSEN, J. concur.

IN THE DISTRICT COURT IN AND FOR MUSKOGEE COUNTY STATE OF OKLAHOMA

WILLIAM MARION WALKER, Plaintiff, vs. BOARD OF COUNTY COMMISSIONERS OF MUSKOGEE COUNTY, OKLAHOMA AND MUSKOGEE COUNTY COURT CLERK, NADINE HARNAGE, Defendants.	)	C-84-1518

JOURNAL ENTRY OF JUDGMENT
(Filed May 5, 1987)

The court, after having been advised of the premises and after reviewing instruments of record and briefs in support thereof, finds and holds that the above named defendants' motion to reconsider and motion to dismiss is hereby sustained. The court further finds and holds that the defendant Nadine Harnage, Court Clerk of Muskogee County, Oklahoma, has complete immunity for acts complained of by plaintiff in that said acts were purely ministerial ones and were at the direction and order of a district judge. The County of Muskogee therefore cannot be liable for the act of one of its officers who has complete immunity.

/s/ Lyle Burris
Judge of the District Court

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Tuesday, April 3, 1990

THE CLERK IS DIRECTED TO ISSUE THE FOLLOWING ORDERS

68,800 William Marion Walter v. Board of County Commissioners of Muskogee County, Oklahoma and Muskogee County Court Clerk, Nadine Harnage.

Rehearing denied.

CONCUR: Hargrave, C.J., Opala, V.C.J., Hodges, Lavender, Simms, Doolin, Wilson, Kauger, JJ.

DISQUALIFIED: Summers, J.

s/ Rudolph Hargrave